R&S Truck Body Company, Inc. *and* National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO. Cases 9–CA–34153, 9–CA–34428, and 9–RC–16781

February 15, 2001

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 6, 1999, Administrative Law Judge Steven M. Charno issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, R&S Truck Body Company, Inc., Allen, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the challenges to the ballots of the following employees are overruled: Greg Adkins, Michael Auxier, Ernie Blevins, Nero Blevins, Ronnie Castle, Terry Chaffins, William Chandler, Ervin Collins, Thomas Floyd, Jeff Howard, DeWayne Kendrick, Willis Matthews, Ray Knott, Eric Newberry, Greg Tackett, Randy Wiley, and Mike Williamson.

IT IS FURTHER ORDERED that Case 9–RC–16781 is severed from Cases 9–CA–34153 and 9–CA–34428, and that it is remanded to the Regional Director for Region 9 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, within 14 days from the date of this decision, open and count the ballots of the employees listed above, and that he shall prepare and serve on the parties a revised tally of ballots.

If the revised tally of ballots in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election and conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

Deborah Jacobson, Esq. and *Theresa Donnelly, Esq*., for the General Counsel.

David K. Montgomery, Esq. and *Heather L. Thurston, Esq. (Keating, Muething & Klekamp, P.L.L.)*, of Cincinnati, Ohio, for the Respondent.

Robert L. Templeton, Esq., of Ashland, Kentucky, for the Charging Party.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to charges timely filed, a consolidated complaint was issued on June 6, 1997, which alleged that R&S Truck Body Company, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by unlawfully discriminating against its employees and interfering with their exercise of protected rights. Respondent's answer denied the commission of any unfair labor practice.[1]

A hearing was held before me in Prestonsburg, Kentucky, on July 8–9 and September 23–24, 1997. The record was held open for the receipt of late-filed exhibits until October 2, 1997. Simultaneous posthearing briefs were thereafter submitted by the General Counsel and Respondent under extended due date of December 11, 1997; the Charging Party filed a brief on December 15.[2]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with facilities in Allen, Kentucky, is engaged in the manufacture of truck bodies. Respondent's manufacturing operation is divided into four departments: Steel, aluminum, "Page," and Installation. During the 12 months preceding issuance of the complaint, Respondent, in the course of its business, sold, and shipped goods valued in excess of $50,000 to points outside the State. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

The National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO (Union) is a labor organization within the meaning of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[1] The complaint and answer were further amended during the hearing in response to newly discovered evidence.

[2] By motion served December 13, 1997, counsel for the Charging Party seeks permission to file an untimely brief. For the reasons detailed in that motion, permission is granted.

II. ALLEGED UNFAIR LABOR PRACTICES[3]

A. Background

In late May 1996,[4] Respondent's general manager, Charles Collins, was told by a vendor that some of Respondent's employees were interested in organizing a union. Collins so informed Respondent's president, William Smith Sr., who held a series of employee meetings in June or early July at which unionization was discussed. During at least one of these meetings,[5] Smith Sr. told his employees that (1) Respondent was "bursting at the seams" with orders and was building a new plant, (2) the employees should not sign union cards, and (3) Smith would close the plant before allowing his employees to bring in a union.[6]

In early July, employee Mark Salyer spoke with three other employees in the presence of Foreman Bobby Hyden, an admitted supervisor. Employee Hassel Hall asked Hyden if the latter knew anything about the Union and Hyden replied in the negative. When Hall said the Union would be a good thing, bringing better pay and benefits, Salyer responded that felt that he was undercompensated and would be "all for" a union which improved his working conditions.[7] About 6 months prior to this, employee Thomas Floyd had spoken favorably about unionization to his immediate supervisor, Tony Culver, and the then-Plant Manager Mike Langfield.[8]

On July 12, Respondent laid off employees Floyd, Salyer, Mark Fraley, Craig Hall,[9] Chris Pence, Jim Smith Jr., and Grady Yates. Each employee received a notice signed by Respondent's plant manager, Bill Smith Jr., which stated:

> Due to present economic conditions and lack of orders, we are forced to have a layoff effective this date.
>
> . . . .
>
> We view this as a temporary situation and hope for new orders in the near future that would make a recall possible.

Smith Jr. also met individually with Floyd and Salyer, iterating the temporary nature of the layoff and telling each employee to expect to be recalled when business was better.[10] The personnel files of the laid-off employees contain "Do Not Rehire" instructions.

B. August[11]

Subsequent to the employee meetings conducted by Smith Sr., employees Jeff Howard and Ray Knott,[12] after hearing rumors that Respondent's management "had our name already," decided to contact the Union. They spoke with employee Greg Adkins, who contacted the Union's national organizer, Johnny Thacker; the latter scheduled a union meeting for August 1. Adkins, Howard, Knott, Barry Bailey, Ricky Blevins, William Chandler, and Bobby Rowe, all of whom were employees in Respondent's aluminum department, thereafter participated in discussions concerning the Union and the upcoming meeting. On the morning of August 1, James Riley Hall, aluminum department foreman and an admitted supervisor, approached employee Terry Chaffins and warned him to "stay out of the huddles."[13] Chaffins did so. That afternoon, Hall directed Chandler, Howard, and Eric Newberry to report Smith Jr. who informed at least one of them that that Respondent was "going to have to let some of [them] go for a little while."[14] The three received layoff notices which contained language identical to that quoted above from the July 12 notice.

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[3] Except as indicated, the following findings are based on uncontroverted evidence.

[4] All dates hereinafter are 1996, unless otherwise indicated.

[5] Smith Sr. testified that this meeting took place on June 4, 1996.

[6] The first two statements in text are based on the credited testimony of employee Ray Knott, which testimony was supported by Smith's purported script. The third statement is based on the patently unrehearsed and mutually corroborative testimony of Knott and employees Greg Adkins, Ricky Blevins, Terry Chaffins, Mark Salyer, and Randy Wiley. Smith denied making the threat attributed to him and provided a document bearing the caption "Information Read To Employees June 4, 1966," which did not contain the threat. The use of the past tense in the document's caption, together with the fact that none of the employees recalled Smith using a script at the meeting in question, suggest that the document was prepared after the meeting, rather than used during it. The fact that some employees who attended the meeting did not recall whether Smith Sr. made the statement attributed to him is of limited probative value. For these reasons and based on my observation of the witnesses while in the hearing room, I credit the employees over Smith.

[7] This finding is based on Salyer's uncontroverted account.

[8] This finding is based on Floyd's uncontroverted testimony.

[9] Craig Hall, who is so denominated in his layoff notice, is sometimes referred to in the transcript as "Greg" Hall.

[10] Floyd and Salyer testified to this effect, while Smith Jr. testified that (1) the layoffs were not due to "economic conditions," (2) the layoffs were permanent, not temporary, and (3) he had never spoken with the employees. I credit the employees' testimony over that of Smith Jr., whom I found to be a completely unreliable witness for the following reasons: (1) his demeanor while testifying did not inspire confidence in his veracity, (2) he was repeatedly forced to change his story during cross-examination, (3) his accounts were often improbable, illogical or internally inconsistent and (4) his testimony was sometimes evasive and frequently in direct conflict with documentary evidence taken from Respondent's files.

[11] There is evidence of a conversation, which "probably" took place in August, between employees Greg Tackett and Ray Hall. The latter was (1) J. R. Hall's brother, (2) one of Respondent's supervisors from October 18, 1993, until his June 20, 1996 discharge, and (3) a statutory employee from his July 15, 1996 rehire until the conversation. Citing *Beaird Industries,* 311 NLRB 768 (1993), and *United Cloth Co*., 278 NLRB 583 (1986), the General Counsel contends that Ray Hall was Respondent's agent at the time of the conversation. Unlike the cases relied on by the General Counsel, there is no evidence here that (1) the listener believed or had reason to believe that the speaker was a member of or still had authority to speak for the employer's management or (2) a close family bond existed between the speaker and the employer's owner which might give rise to apparent authority. I must therefore reject the General Counsel's contention.

[12] Ray Knott, who is so identified in Respondent's personnel records, is sometimes referred to in the transcript as "Knot."

[13] Chaffins credibly testified to this effect.

[14] Howard's testimony to this effect is supported by (1) the layoff notices admittedly signed by Smith Jr. and (2) the August 1 memo to Smith Jr. from his superior which directed the layoff and stated "[m]aybe sales will improve enough a little later so that we can add people back to these positions . . . ." Smith Jr. testified that the layoffs were permanent, not temporary, and that he had no conversations with

The next day, Knott asked J. R. Hall why Chandler and Howard had been laid off. Hall replied that he "wished he could tell [Knott] but it was out of his hands."[15] The same day, Chaffins asked Hall if the latter thought the three laid-off employees would be recalled. Hall responded that they would never be called back because they had been "talking Union." When Chaffins insisted that it was "just small talk," Hall stated that Respondent's management thought that (1) Chandler was the leader and (2) "all the Union talk is coming from the aluminum Shop."[16] Also on August 2, Foreman William Maynard, an admitted supervisor, called aside "Page" department employees Dave Maynard, who was William's brother, and Elmer Watkins to let them "know what was going on." The supervisor told them that "the reason them boys got laid off was for talking about the Union" and that John, a parts cleaner in the "Page" department, had been laid off because Human Resources found that he had been "causing problems at the last place he worked."[17]

During the last 2 weeks of August, J. R. Hall had conversations about the organizing campaign with several employees. On August 16, Hall told Chaffins that he had seen Chaffins and Knott leave for the union meeting the night before and warned "that's going to get you in a lot of trouble"; Chaffins responded "I can't help it James, I've got to do something."[18] Thereafter, Hall told Chaffins and employee Ricky Blevins that "you boys are going to be next"[19] and, separately, told Chaffins and Adam Swiney that "it's going to happen to you sooner or later."[20] Independently, Hall told Swiney that "he knowed what we was doing and it was going to cause him to lose his job."[21] Toward the end of the month, Hall was approached by employee Bob Hall who pointed out that the workload was increasing and asked when Respondent was going to bring back the laid-off employees; J. R. Hall, in Adkins' presence, replied "they'll never bring those boys back because of the Union."[22] On August 27, the day after Ronnie Castle signed a union petition on the road outside Respondent's facility at quitting time, Hall remarked "there goes another one" as Castle went by.[23] Also around August 27, Hall approached Adkins and, implicitly referring to a decision to distribute literature reached at the union meeting the night before, asked "what time is them boys going to handbill out there?"[24] Later that day, Hall again approached Adkins, stating "because you boys bring that damn Union in here I'm going to lose my job."[25]

During the last third of August, Smith Jr. had two encounters involving the Union. The first took place on approximately August 20, when Smith Jr. called in Nero Blevins, a crew leader and assistant foreman (both nonsupervisory positions) who had not hitherto openly supported the Union, and asked whether the latter had "heard anything about the Union." When Blevins responded affirmatively, Smith Jr. asked him to "influence the younger employees, that [unionization] wasn't good for R&S." When Blevins hedged, asking if he might receive additional pay for serving as an assistant foreman, Smith Jr. responded that he would "see what he could do . . . come . . . evaluation time."[26] The second encounter began on August 21, when Smith Jr. issued a written warning prepared by J. R. Hall to employee Bobby Rowe. According to the text of the warning from Rowe's personnel file, the nature of his "violation" was "Union Activity" which consisted of "talking to people during work about [the] union." It appears uncontested that Respondent's employees are allowed to discuss sports and domestic matters during working hours.[27] On August 22, Rowe approached Smith Jr. and requested a voluntary layoff. Smith Jr. responded that there was no lack of work which would justify a layoff and stated that Rowe would have to resign. When Rowe, who had received a good performance evaluation less than a month before, did so, Respondent placed the following

the laid off employees. For the reasons set out in this and prior footnotes, I do not credit Smith Jr.

[15] Knott credibly so testified.

[16] Chaffins so testified with convincing detail. Hall, who responded with a general, summary denial, testified (1) in an inconsistent and self-contradictory manner concerning his knowledge of employees' union activities and (2) in a manner directly contradicted by Foreman Hyden concerning the degree of interaction between Respondent's supervisors and its labor consultant. Respondent argues on brief that Hall's failure to tell Knott the reason for the layoffs, while revealing those reasons to Chaffins, effectively invalidates both accounts. Because I have no difficulty with the concept that Hall might have reason to be more forthcoming with a long-standing employee than with one of less tenure, I must reject the argument. For the foregoing reasons and based on the witnesses' demeanor while testifying, I credit Chaffins over Hall.

[17] Watkins so testified, while William Maynard denied the statements attributed to him. Watkins was a straightforward witness who (1) testified consistently on direct and cross-examination, (2) provided convincing detail, (3) candidly made admissions damaging to the Union, and (4) was still in Respondent's employ at the time he testified. See *Unarco Industries,* 197 NLRB 489, 491 (1972). Contrary to Respondent's argument on brief, I find Human Resources Manager Boduch's testimony concerning the period he was on a leave of absence to be too confused to be of probative value. For the foregoing reasons, as well as the witnesses' demeanor, I credit Watkins' account over Maynard's summary denial.

[18] Chaffins credibly so testified, while Hall generally denied spying on employees and making threats. Based on the reasons set out above, I credit Chaffins over Hall.

[19] Chaffins' credible testimony to this effect was supported by Blevins' testimony that Hall had told the two of them that they were "gone." Hall generally denied having made any threats. For the reasons set out above, I again credit Chaffins over Hall.

[20] For the reasons set out above and based on the witnesses' demeanor while testifying, I credit Chaffins to this effect over Hall's general denial.

[21] Swiney so testified and, based on the reasons set out above and on the witnesses' demeanor, I credit him over Hall's general denial.

[22] Adkins, who was still employed by Respondent when he took the stand, so testified. See *Unarco Industries*, supra. Hall generally demurred. For the reasons set out above, I credit Adkins over Hall.

[23] Castle credibly so testified and, for the reasons detailed above, I credit his account over Hall's denial.

[24] Adkins credibly so testified and, for the reasons discussed previously, I credit his account over Hall's denial.

[25] For the reasons set out above, I credit Adkins' testimony to this effect over Hall's general denial.

[26] Nero Blevins testified cogently, consistently and without controversion concerning this conversation, and I credit him.

[27] During his cross-examination, Smith Jr. made an admission to this effect.

notation on his employment record: "Do Not Rehire . . . Refer To File." There is no evidence that any other employee who voluntarily quit was comparably treated.[28]

On August 22, employees Nero Blevins, DeWayne Kendrick, and Randy Wiley first attended a union meeting, during which each signed the Union's representation petition. The following day, the three employees were told to report to Smith Jr.'s office. When they arrived, they were (1) informed that they were suspended for threatening and harassing unidentified fellow employees, (2) not told the nature of the alleged threats and harassment, and (3) assured that an investigation would be conducted before any further action was taken by Respondent. On August 26, Respondent terminated all three employees. Internal appeals by Kendrick and Wiley resulted in their discharges being upheld on September 5. When Blevins tried to file an appeal around September 10,[29] Collins rejected it, saying that they weren't going to change their minds about the discharges.[30] It appears uncontested that "[t]here really was no investigation"[31] and that the totality of Respondent's investigative efforts consisted of (1) an August 23 tape recording of harassment complaints by employees Leroy Cox and Moses Frasier, (2) Smith Jr. ascertaining that neither Cox nor Frasier could recall whether there were any witnesses to the alleged harassment and (3) Smith Jr. asking Collins whether Cox and Frasier could be believed.[32] It also appears uncontested that, prior to termination, Blevins, Kendrick, and Wiley were never (1) told the identity of their accusers, (2) informed of the nature of the accusations made against them, or (3) asked for their versions of events or for the names of witnesses. Smith Jr. reasoned that such a confrontation was not required because he had already decided to believe Cox and Frasier. Smith Jr. further illogically contended that he did not need to assess the credibility of Blevins, Kendrick, and Wiley[33] *before* firing them because (1) they failed to deny the alleged facts underlying their suspensions, which facts were concededly unknown to them, and (2) there were inconsistencies in the stories told by Kendrick and Wiley *after* they were discharged.

During a lunch hour in August, employee Greg Tackett, who had been discussing the Union with a group of employees at a table in Respondent's cafeteria, rose to his feet and loudly commented "Charles Collins started the Union when he fired Mike Langfield." Immediately thereafter, Foreman Hyden called Smith Jr. on a two-way radio and asked to see him immediately.[34] On August 25 or 26, Hyden asked Mitchell Goble if the latter knew why Blevins, Kendrick, and Wiley had been suspended. When Goble suggested that Hyden was aware of the reason, Hyden responded affirmatively, stating "I've warned them boys about getting mixed up in that Union stuff."[35] In an August 28 conversation with employees Brad Meadows and Donald Morrison, Hyden agreed that Smith Sr. "would shut down before he would let it go Union or let anyone try to control his company."[36] The next day Hyden, while driving Morrison to the hospital after a forklift accident, said he didn't know how Morrison felt about the Union but that Smith Sr. had said that (1) he didn't have any of his own money invested in a proposed, nearby expansion site and (2) he would close his Kentucky facilities and go to Florida (where Respondent concededly had an unused truck body manufacturing facility[37]) "before he'd let it go Union."[38]

At a mandatory captive audience meeting for Respondent's employees which took place on or about August 26,[39] Collins made a presentation about the Union's organizing campaign, copies of which were handed out, which contained the following language:

> AT THIS POINT, ALL THIS ACTIVITY IS SERVING NO ONE. IT'S AFFECTING PRODUCTION PROFITS AND YOUR PROFIT SHARING MONEY. . . . IF THEY GET A LARGE ENOUGH NUMBER OF LEGITIMATE PEOPLE TO SIGN THE PETITION, WE WILL DO WHATEVER IS NECESSARY IN THE FUTURE TO MAKE SURE R/S REMAINS A NON-UNION MANUFACTURER. . . . YOU HAVE A CHOICE! DON'T LET PEOPLE PRESSURE YOU INTO DOING SOMETHING AGAINST YOUR WILL. DON'T LET ANYONE INTIMIDATE OR THREATEN YOU. PLEASE LET US KNOW IF ANY OF THESE TACTICS HAPPEN.[40]

At the close of business on August 29, J. R. Hall informed aluminum department employees Greg Adkins, Ernie Blevins, Ronnie Castle, Terry Chaffins, Adam Swiney, Greg Tackett, and Mike Williamson that they were being laid off for lack of work. Each of the employees was given a notice from Smith Jr.

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[28] Findings concerning Rowe's warning and departure from Respondent's employ are based on the documentation in his personnel file. To the extent that Smith Jr.'s testimony may be thought inconsistent with those documents or to deny the relationship between the "Do Not Rehire" decision and the August 21 warning, I do not credit Smith Jr. for the reasons set forth in prior footnotes.

[29] Collins conceded that the employees were not given a deadline by which to appeal.

[30] Blevins credibly testified to this effect without controversion.

[31] Smith Jr. testified to this effect on cross-examination.

[32] Smith Jr. so testified.

[33] Smith Jr. conceded that he did not ask Collins whether Blevins, Kendrick, and Wiley could be believed.

[34] Tackett and Rodney Goble Sr. so testified. Hyden, who denied making the call, displayed poor recall of his training as a supervisor during an organizing campaign and most of his testimony on direct examination was elicited in response to highly suggestive, leading questions by Respondent's counsel. For these reasons and based on the witnesses' demeanor, I credit Tackett and Goble over Hyden.

[35] I credit Goble's uncontroverted testimony to this effect. Because the leading question addressed to Hyden was phrased prospectively, his response did not constitute a denial of the comment attributed to him.

[36] Morrison so testified in a convincingly detailed and consistent manner. For the reasons set out above and based on the witnesses' demeanor, I credit Morrison over Hyden's denial.

[37] Smith Sr. testified to the existence of this facility.

[38] For the reasons set forth previously, I credit Morrison's testimony to this effect over Hyden's partial denial.

[39] The date of the meeting is drawn from Ray Knott's testimony, which is supported by the April 8, 1997 affidavit of Rodney Goble Sr. placing the meeting in August.

[40] This language is taken directly from Respondent's handout at the meeting.

which stated "[d]ue to present economic conditions and lack of orders, we are forced to have a reduction in force effective this date." After the other employees had left, Chaffins approached J. R. Hall and asked the reason for the layoff. Hall replied "you know why you're getting laid off . . . it was over you talking Union . . . you knowed what you was getting yourself into . . . " and asked whether Ray Knott was "in on it." When Chaffins responded in the affirmative, Hall asked if Knott was "the leader." Chaffins replied, "I can't answer that question James" and left.[41] The following day, Knott returned from vacation and was laid off. All eight of the laid-off employees had signed the union representation petition prior to the layoff.

On August 30, Steel Department Foreman Sy Hamilton, an admitted supervisor, departed from his usual custom by visiting Ricky Blevins in the latter's work area. Hamilton asked the location of Mike Williamson, Blevins replied that Williamson had been laid off, Hamilton asked if Williamson was "one of them" and, in response to Blevins' query as to Hamilton's meaning, the latter responded "you know."[42]

Also on August 30, the Union filed the representation petition which initiated Case 9–RC–16781.

C. September

On September 6, Chaffins and Knott, while visiting Respondent's facility to pick up their paychecks, spoke with Smith Jr. Knott asked why Respondent laid him off rather than transfer him to another position in accord with the policy articulated in the employee handbook. Smith Jr. replied, "there are no openings now . . . as soon as works [sic] picks up you all will be hired back . . . ."[43] The same day, Respondent sent letters to the employees laid off on July 12 and August 1 stating "[b]ecause of the permanent nature of the August 29, 1996 reduction in force, we need to change your layoff status to permanent reduction in force."

Between 2 and 3 weeks after handing out union literature in Respondent's parking lot in the presence of J. R. Hall, Hyden, and Smith Jr., Mitchell Goble was suspended and terminated on September 19 by Smith Jr., purportedly for violating Respondent's attendance policy. Goble was not issued an August 22 attendance warning purportedly given to him.[44] After Goble missed work on September 18, he arrived at Respondent's facility on September 19 with documentation that pregnancy complications had required him to take his wife to the hospital the day before.[45] A September 19 notation in Goble's personnel file indicates that another employee had reported to Respondent that Goble had attended a union meeting the day before. The record contains no evidence of any legitimate reason why the comment should appear on the papers relating to Goble's discharge, since the meeting in question took place after Goble's scheduled working hours.[46]

D. October

During the week preceding the October 11 representation election, Respondent held a series of mandatory captive audience meetings at a local hotel. At one meeting for second-shift employees, Hal Craft, an agent of Respondent,[47] stated "Bill Smith did not have to put his plant here . . . he could shut it down any time he wanted to." In response to Craft's request for corroboration, Smith Sr. then confirmed that he could "just close down the whole shop."[48]

On the evening of October 10, the Union held a voluntary rally attended by 50 to 60 of Respondent's employees at a state park near the facility. Based on advice that Craft had been telling Respondent's employees that the Union's contract with Cook Family Foods only provided for 5-cent annual wage increases,[49] Daniel Anderson Jr., the Union's vice president, showed the employees a copy of the Cook Family Foods contract which he said permitted total hourly wage gains of approximately $2 over the contract's 4-year life.[50]

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[41] Findings concerning this conversation are based on Chaffins' testimony, which I credit over Hall's general denial for the reasons set out above.

[42] Blevins credibly so testified without controversion.

[43] Chaffins' credible testimony concerning the exchange was supported in part by Knott. To the extent that Smith Jr.'s testimony is thought to be inconsistent with that of Chaffins and Knott, I do not credit Smith Jr. for the reasons set forth in prior footnotes.

[44] Goble's testimony that he had never seen the August 22 warning before his discharge is supported by the fact that the warning did not bear his signature, unlike the other disciplinary actions in his file. On cross-examination, Smith Jr.'s testimony concerning the missing signature was confused and internally inconsistent and he could not recall the circumstances surrounding the August 22 warning or identify the conduct for which Goble allegedly received it. For the reasons set out in this and prior footnotes, I do not credit Smith Jr.

[45] Goble so testified and the documentation upon which he relied is of record.

[46] For the reasons set out prior footnotes, I do not credit Smith Jr.'s testimony that he did not consider the comment when deciding to discharge Goble.

[47] My finding concerning agency is based on Smith Sr.'s admission that he hired Craft who conducted the captive audience meetings, as well as uncontroverted employee testimony that Craft conducted those meetings in Smith Sr.'s presence.

[48] Findings concerning this meeting are based on the mutually supportive and credible testimony of employees Rodney Goble Jr. and Douglas Isaac. Smith Sr. admitted attending the meeting run by Craft but did not attempt to refute the account given by Goble and Isaac. While Craft testified in contravention of a portion of the two employees' testimony, he refused to answer questions relevant to the issue of his bias, thereby demonstrating a total lack of respect for his oath to tell the whole truth, as well as contempt for the processes of this Board. For this reason and based strongly on his demeanor while in the hearing room, I refuse to credit any of Craft's testimony which might be thought favorable to Respondent.

[49] For the reasons set forth previously, I reject Craft's testimony that he did not make the statement in question.

[50] These findings are based on Anderson's testimony, which is supported by the contract in question. Employee Ritchie Martins testified on behalf of Respondent that Craft had showed him a copy of the contract with wage rates of "like seven something" and that the wage rates in a contract displayed at the union meeting were $1.50 to $2 higher. Martins did not testify that the Union had characterized Craft's copy of the contract as a "fake" (an affidavit prepared by Respondent contains a reference to this effect); indeed, Martins was not even able to recall who spoke about the contract's wage rates on behalf of the Union. Martins was a troubling witness for a number of reasons: (1) his testimony was confused and he clearly had no present recollection at the time he testified as to any relevant probative fact, (2) his description of the way wages were set forth in the Cook Family Foods contract is

On October 11, Thomas Floyd arrived at Respondent's plant in order to vote in the representation election. After being told by Respondent's Receptionist that he was ineligible to vote, Floyd was ushered outside by Hyden. The two talked about Floyd getting his job back with Hyden stating that "business was picking back up . . . and they were talking about starting the job back on second shift." Hyden went on to state that (1) "right now was a bad time to be in the facilities . . . since all this Union stuff was going on," (2) it was "[b]est to leave everything alone" and "best not to get involved" and (3) Floyd should call him later at home concerning the job.[51]

Also on October 11, Smith Jr. approached employee William Ward outside a door to the facility and began a conversation which included (1) Smith Jr.'s acknowledgment that Respondent had made mistakes in the past, (2) Ward's agreement and (3) the new Plant Manager's entreaty: "give me a chance, that's what I'm here for, to correct those mistakes."[52]

The October 11 election was conducted for employees in the following stipulated unit:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its main and "Page" facilities located at 5165 Kentucky Route 1428, Allen, Kentucky, including, but not limited to crew leaders, miscellaneous labor, welders, janitors, power take-off, truck drivers, electricians, mechanics, aluminum wash, quality control inspectors, painters, clean-up/production, forklift operators, outside clean-up, small parts, special equipment operators, fitters, tackers, press/shear, trailer assembly, parts runner, parts window clerk, receiving clerk, shipping clerk, shipout clerk and UPS shipping clerk, but excluding all sales persons, managerial employees, office clerical employees and all professional employees, guards and supervisors as defined in the Act.[53]

Respondent won the election by a one-vote margin of the 111 ballots counted. Nineteen ballots were challenged; 14 of the challenges were interposed by a Board Agent and 5, by the Union.

E. Postelection Activities

Shortly after the election, Respondent eliminated its second shift. Of the 28 employees on the second shift at that time, 1 left Respondent's employ, 22 were transferred to the same position at the same rate of pay on the first shift, 2 crew leaders were demoted to less-skilled installation welder positions at the same rates of pay, and 1 installation welder was demoted to a less-skilled tacker position[54] at the same rate of pay. Only two employees from the second shift were offered a demotion to a first-shift position at *reduced* pay:[55] Rodney Goble Jr. and Doug Isaac. Both men were outspoken union supporters, whose organizing activities during the month before the election were known to Respondent's management.[56] Isaac, a trailer assemblyman who had been making $7.25 per hour on the second shift, was offered a $6.50-an-hour cleanup position on the first shift. Isaac declined the position, explaining to Smith Jr. that he could not afford to work at the offered wage. The next day, Rodney Goble Jr., the parts window clerk on the second shift earning $6.50 an hour, was offered the same cleanup position at $6 an hour and accepted it, only to resign the following day.

In December or the following January, Rodney Goble Jr. telephoned Gary May, who had been Goble's supervisor when the former was a parts window clerk, and asked if May could help Goble get his job back; May responded that he would see what he could do. Sometime in January, Respondent's parts window clerk was discharged and the position was filled internally. Respondent has often rehired employees who quit or were terminated.

On February 4, 1997, Robert Boduch, Respondent's human resources manager, began calling the following former employees in order to offer them jobs: Greg Adkins, Ernie Blevins, Ronnie Castle, John McFarland, Mark Salyer, Chris Spence, Adam Swiney, Greg Tackett, and Mike Williamson.[57] The offers to known union adherents Adkins, Blevins, and Swiney required them to fill out applications as "new hires," forfeit the seniority they had accrued, go through a probationary period, not take vacation for 12 months and for Adkins to submit to a new welding test and Blevins to take a cut in pay.[58]

F. Discussion

1. Interference with employee rights

The record is replete with evidence of animus toward the Union at every level of Respondent's management. Respondent's president, Smith Sr., threatened plant closure at the outset of the Union's organizing efforts in June or early July and

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completely mistaken (examination of either of the copies of the contract in evidence shows different wages for production and maintenance workers, as well as job classification and skill differentials, whereas Martins testified that the only wage rate differences were due to longevity), (3) it is uncertain from Martin's conflicting accounts whether he actually examined a copy of the Cook Family Foods contract on October 10, (4) his contemporaneous handwritten notes of what occurred had been surrendered to Respondent and were no longer in existence at the time of the hearing, and (5) a later affidavit prepared by Respondent in anticipation of litigation, which Martins confirmed under oath to be "exactly" the same as his handwritten notes, contained statements shown to be incomprehensible to him. For the foregoing reasons and based heavily on his demeanor while on the stand, I find Martin's account to be unreliable.

[51] Floyd cogently so testified with convincing detail, while Hyden denied a portion of the comments attributed to him. For these reasons, as well as those set forth in prior footnotes, and based on my observation of the demeanor of both witnesses while testifying, I credit Floyd over Hyden.

[52] Wood credibly testified to this effect, while Smith Jr. did not directly testify concerning the interchange.

[53] This unit description was drawn from the Stipulated Election Agreement entered by Respondent and the Union on September 10 and approved by the Regional Director on September 12.

[54] Smith Jr. conceded that, while welder is a skilled position, tacker is "not really classified as a skilled position."

[55] The salaried second-shift supervisor was offered a position on the first shift as an hourly employee.

[56] I credit the uncontroverted testimony of Goble and Isaac to this effect.

[57] Boduch's contemporaneous notes so indicate.

[58] This finding is based on Boduch's notes and the uncontroverted testimony of Adkins, Blevins, and Swiney.

confirmed a plant closure threat made by Respondent's consultant during the week before the representation election. During an August 26 captive audience meeting, Respondent's general manager, Charles Collins, impliedly threatened profit sharing reductions and other unspecified reprisals for union involvement and encouraged employees to report union solicitations to Respondent. See *Bil-Mar Foods of Ohio,* 255 NLRB 1254 (1981). Plant Manager Smith Jr., in addition to initiating the discriminatory personnel actions discussed below, interrogated Nero Blevins, solicited his aid in campaigning against the Union, and impliedly promised to reward him for that aid. On the day of the election, Smith Jr. also impliedly promised improved working conditions if the Union was defeated. All of these activities constitute violations of Section 8(a)(1) of the Act.

During the campaign, Respondent's front line supervisors repeatedly delivered a double message that the employees' union activities were known to Respondent and that Respondent would punish union supporters. Aluminum department employees were subjected to Foreman J. R. Hall's (1) August 1 admonition to stay out of discussions about the Union,[59] (2) August 2 declarations that Respondent's management believed (a) Chandler was the leader of the organizing campaign and (b) the aluminum department was the campaign's wellspring, (3) August 2 statement that the aluminum department employees laid off the prior day would never be recalled because of their union activities, (4) August 16 comment to Chaffins creating an impression of surveillance, (5) August 16 threat to Chaffins of unspecified reprisals because of the latter's union activities, (6) August 16 threat to two employees that they would be among the "next" to leave Respondent's employ, impliedly as a result of engaging in union activities,[60] (7) August 16 threat to two employees that they would be discharged, impliedly as a result of their union activities,[61] (8) August 16 comment to Swiney creating the impression of surveillance,[62] (9) August 27 comments to Adkins creating the impression of surveillance, (10) August 27 interrogation of Adkins concerning the latter's union activities,[63] (11) August 29 interrogation of Chaffins concerning another employee's union activities, and (12) a declaration to Chaffins that he was being laid off on August 29 for engaging in union activities. Employees in the "Page" department were told by Foreman Maynard on August 2 that (1) the August 1 layoff of three aluminum department employees took place because those employees were engaged in union activities, (2) Respondent had contacted the prior employer of a "Page" Department employee concerning that employee's activities during his prior employment and (3) that a "Page" department employee had been laid off by Respondent for, by implication, engaging in union activities during his prior employment. Respondent's employees received the message from Foreman Hyden in the following manner: (1) an August radio call from Respondent's cafeteria which created an impression of surveillance,[64] (2) a declaration made around August 25 that three employees had been suspended for engaging in union activities, (3) an August 28 confirmation of a threat of plant closure, and (4) an August 29 threat of plant closure. In the steel department, Foreman Hamilton implied that the August 29 layoff was due to the union activities of the laid-off employees. To the extent that the foregoing supervisory actions were alleged to be unlawful in the complaint, I find that they constituted unfair labor practices violative of Section 8(a)(1) of the Act.[65] I further find that Hyden's October 11 comments to Floyd did not rise to the level of an unlawful promise of benefit.

2. Discrimination against individual employees

It is undisputed that Smith Jr. gave Rowe an August 21 written warning for talking to fellow employees about the Union, at a time when Respondent permitted employee working time conversations about all other subjects. That warning is an unfair labor practice violative of Section 8(a)(3) of the Act. See *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986).

The General Counsel contends that the suspensions and terminations of Blevins, Kendrick, and Wiley were unlawful. Respondent counters that the employees were discharged for threatening or intimidating fellow workers who did not support the Union. The record contains overwhelming evidence of Respondent's animus toward the Union. The record clearly demonstrates that Respondent was kept apprised of the union activities of its work force,[66] and the employees in question were terminated on the day after their first public involvement with the Union. Finally, there is not a scintilla of evidence that Respondent conducted any kind of investigation of the underlying harassment complaints between the time it suspended Blevins, Kendrick, and Wiley "pending investigation" and the time it fired them. Based on the foregoing facts, I find that Respondent's purported basis for the three terminations is pretextual.[67] This finding is buttressed by Foreman Hyden's statement that the discharges were due to union activities. Accordingly, I conclude that the suspensions and discharges of Blevins, Kendrick, and Wiley were unfair labor practices in violation of Section 8(a)(3) of the Act.

The General Counsel argues that Mitchell Goble's September 19 discharge was unlawful. Respondent counters that Goble was terminated for absenteeism pursuant to the com-

[59] The complaint does not contain an allegation relating to this conduct.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Respondent appears to argue that holding a supervisor training session on union organizing in April or May and another when Craft was hired several weeks before the election effectively eliminates any possibility that its supervisors violated the Act. At the time of the first session, the supervisors had no reason to believe that the training had any direct relevance to their jobs. Almost all of unlawful supervisory conduct took place 3 to 4 months after the first session and prior to the second. For the foregoing reasons, I find Respondent's argument unpersuasive.

[66] Illustrative are the note in Mitchell Goble's personnel file and J. R. Hall's foreknowledge of union handbilling.

[67] This finding moots the question of whether the complaints made by Cox and Frasier, if believable, would have justified the disproportionately harsh and demonstrably disparate discipline imposed on Blevins, Kendrick, and Wiley.

pany's progressive disciplinary system. I infer from the recordation of Union activity in Goble's personnel file that he was a subject of Respondent's demonstrated antiunion animus at the time of his discharge. It is uncontested that Goble would not have been fired on September 19 absent the August 22 warning.[68] Given my earlier finding that no such warning was issued to Goble, I find that the purported reason for his termination was pretextual. I therefore conclude that his discharge was an unfair labor practice violative of Section 8(a)(3) of the Act.

The General Counsel requests a finding that Doug Isaac and Rodney Goble Jr. were subjected to discriminatory pay cuts. Respondent apparently argues that Isaac and Goble were the only employees to be transferred to a different positions when the second shift was eliminated,[69] the two were demoted to a less-skilled position and were offered wage rates which were "high for that job" but low enough to be "fair to everybody else."[70] Respondent's argument is without support in the record. First, there were five employees who were transferred to less-skilled jobs when the second shift was eliminated; only two—Isaac and Goble—suffered pay reductions. Second, Respondent's fairness contention loses much of its impact in view of the fact that at least one of the transferred employees whose pay was not cut was allowed to earn significantly more than other employees with the same job.[71] Third, the *minimum* rate for the same clean-up position three and one-half months later was higher than the rate offered either Isaac or Goble.[72] Finally, Respondent offered Isaac and Goble the same clean-up position at different rates of pay; if Goble had been offered the rate quoted to Isaac, it would not have been a pay cut for Goble. In sum, there is no evidence that Isaac and Goble were offered either a relatively high rate of pay for the cleanup position or a rate that was fair. Based on these facts, as well as Respondent's antiunion animus and its undisputed knowledge of the union activities of Isaac and Goble, I find the pay reductions were discriminatorily motivated and therefore violative of Section 8(a)(3) of the Act.[73] Given (1) the demonstration of discrimination against Goble in the matter of his pay reduction, (2) Goble's expressed desire in December 1996 or January 1997 to return to Respondent's employ, (3) the availability in January of the parts window clerk position Goble had previously held and (4) Smith Jr.'s exclusion of Goble from the list of former employees who were offered reemployment at the beginning of February 1997,[74] I conclude that the General Counsel has made out a prima facie case that Respondent's failure to rehire Goble was discriminatorily motivated. Respondent has not rebutted this showing with evidence or argument.[75] Accordingly, I conclude that Respondent's failure to rehire Rodney Goble Jr. was an unfair labor practice in violation of Section 8(a)(3) of the Act.

The General Counsel contends that Respondent's February 1997 offers to rehire certain discriminatees on the condition that those individuals waive all rights accrued in their former employment with Respondent are discriminatory. The record is clear that a host of employees have been laid off and recalled by Respondent without loss of seniority. Indeed, the only instance in which employees recalled from layoff were considered "new employees" by Respondent appears to be its February 1997 offers to three known union adherents. Respondent has offered no explanation for its blatantly punitive behavior. I therefore find that the conditional job offers to Adkins, Blevins, and Swiney were discriminatory and conclude that those offers violate Section 8(a)(3) of the Act. The record is silent on the question of whether the job offers extended to Castle, McFarland, Pence, Salyer, Tackett, and Williamson were conditioned in the same manner as those discussed above; I shall therefore recommend dismissal of that portion of the complaint pertaining to these six individuals.

3. The layoffs

a. July 12 layoff

The General Counsel contends that Respondent laid off seven employees on July 12 in a discriminatory attempt to quell support for the Union, while Respondent argues that the layoff was required for legitimate business reasons.[76] The record establishes that (1) the layoff took place shortly after Respondent commenced its counter-offensive to the Union's organizing campaign, (2) the highest level of Respondent's management had displayed significant antiunion animus at the time of the layoff, (3) the layoff appears to be the first in which the laid-off employees had "Do Not Rehire" instructions placed in their personnel files, (4) Respondent was shown to have actual knowledge that at least two of the laid-off employees were union supporters, and (5) some of Respondent's employees informed it of the prounion activities and sympathies of other employees. Smith Jr.'s initial rationale that the layoff was required by "economic conditions and lack of orders," which he articulated in the July 12 layoff notices and in his contemporaneous conversations with the laid off employees, was reaffirmed in Respondent's October 18 position statement.[77] No evidence was offered at the hearing to show the purported lack of orders. Instead, Smith Jr. testified that (1) the seven em-

[68] After unsuccessfully attempting to evade a direct answer, Smith Jr. was forced during cross-examination to concede that Goble would not have been terminated but for the August 22 warning.

[69] Respondent states on brief that a supervisor was "the only other individual who changed jobs as a result of the shift elimination."

[70] Smith Jr. advanced this rationale during his testimony.

[71] Documentary evidence establishes that Johnny Justice, an installation welder demoted to tacker, continued to earn $7.25, when the rate of pay for tackers was between $5.85 and $6.

[72] Boduch's documents indicate a minimum rate of $6.75 at the beginning of February 1997.

[73] Because neither Isaac nor Goble was alleged in the complaint to have been constructively discharged, I will not address the issue.

[74] After some confusion, Boduch testified to this effect.

[75] Respondent did contend that Goble had forfeited any right of recall by quitting. Interestingly, Respondent also argued that its lack of discriminatory intent toward Goble was demonstrated by its refusal to grant his request to be laid off, thereby forcing him to quit.

[76] While the July 12 layoff of Pence and Smith was not alleged in the complaint, it was fully litigated and briefed by both the General Counsel and Respondent. I therefore conclude that the lawfulness of those layoffs may be resolved in this decision without prejudice to Respondent.

[77] Respondent there maintained that the July 12 layoff was "due to declining orders."

ployees had been laid off to improve efficiency,[78] (2) he purportedly used varying criteria to select the specific employees to be laid off, including the ultimately subjective standards of skill and experience, (3) he did not terminate the seven employees for cause and he would have transferred them, rather than laid them off, if their services had been needed anywhere else in the facility, and (4) he was personally responsible for the "Do Not Rehire" instructions. Based on the shifting, implausible, and internally inconsistent rationale for the layoff offered by Respondent, I find its purported justification to be pretextual. Given (1) Respondent's demonstrated animus, (2) its knowledge of the union campaign, (3) the timing of the layoff, (4) the disparate rehire treatment accorded the employees laid off on July 12, and (5) the pretextual justifications advanced for the layoff, I infer that Respondent had actual knowledge of prounion sympathies on the part of all seven employees. See *Montgomery Ward & Co*., 316 NLRB 1248 (1995). I therefore conclude that the July 12 layoff was discriminatorily motivated and violative of Section 8(a)(3) of the Act.

b. August 1 layoff

The General Counsel contends that Respondent's August 1 layoff of aluminum department employees Chandler, Howard, and Newberry was discriminatory;[79] Respondent maintains that it was required by a "reduction in new sales."[80] Facts which bear directly on Respondent's knowledge of the employees' union activities, as well as its motivation for the layoff, include (1) Aluminum Department Foreman Hall's awareness prior to the layoff that the employees under his supervision were discussing the Union, as evidenced by his instruction to Chaffins to stay out of such conversations, (2) Hall's declaration on the day after the layoff that Respondent's upper management believed the aluminum department to be the source of the union campaign and Chandler, the campaign's leader, (3) August 2 statements by Hall and Foreman Maynard to the effect that Chandler, Howard, and Newberry had been laid off for engaging in union activities, and (4) Hall's mid-August statement that Chandler, Howard, and Newberry would not be recalled because of their union activities. Further facts relating to Respondent's motivation include the following: (1) Respondent had been "bursting at the seams" with orders less than 2 months before, (2) a week before the layoff, Hall stated that he didn't believe there was going to be a layoff since there was enough work to keep the aluminum department busy through September or October, (3) the layoff took place the same day as the first scheduled union meeting and involved one of the meeting's organizers, (4) Smith Jr. selected the employees to be laid off based on their seniority in the positions they held on August 1 (job seniority)[81] and did not consider company seniority or an employee's ability to fill other positions (the latter in seeming disregard of Smith Jr.'s marching orders to improve efficiency)—job seniority was apparently the only selection criterion which would allow Respondent to pick Chandler, Howard, and Newberry for layoff.[82] For the foregoing reasons, as well as those discussed in connection with the July 12 layoff, I find that Respondent's August 1 layoff of Chandler, Howard, and Newberry was due to Respondent's belief that those employees supported the Union. Accordingly, I conclude that the layoff was an unfair labor practice in violation of Section 8(a)(3) of the Act.

c. August 29 reduction in force

The General Counsel contends that the reduction in force affecting eight more aluminum department employees on August 29 and 30 was also discriminatorily motivated; Respondent demurs on grounds similar to those it advanced with respect to the August 1 layoff. The following facts are material to the questions of Respondent's knowledge and motive: (1) the union activities of Chaffins and Knott were the subject of surveillance by Aluminum Department Foreman J. R. Hall in mid-August, (2) around August 16, Hall implied Swiney's union activities were under surveillance, (3) Hall's August 27 comment implied that Hall knew that Castle had signed the union petition, (4) Hall informed Chaffins on August 29 that the latter had been laid off for engaging in union activities, (5) Hall was aware of Knott's support for the Union as the result of an unlawful interrogation on August 29, and (6) the impact of the August 29-30 layoffs fell disproportionately on union supporters. See *American Wire Products*, 313 NLRB 989, 994 (1994). Respondent's rationale for the reduction in force appears to be based on Collins' August 29 memorandum which noted that "aluminum orders are almost non existent (sic.)" and directed Smith Jr. to "lay off the necessary people to make each department as productive as possible." Further facts relating to Respondent's motivation are as follows: (1) Smith Jr.'s August 22 statement to Rowe to the effect that there was too much work in the aluminum department to justify the layoff of even 1 individual, (2) aluminum orders went from 13 in June and 17 in July to 34 in August, (2) aluminum production actually declined by 17 percent between July and August (belying Smith Jr.'s testimony of a 60-percent decline in aluminum production after August 1),[83] (3) a more severe, seasonal reduction in the

[78] Smith Jr. testified to the effect that he determined the number of employees to be laid off by arriving at production quotas for the various departments and by dividing each quota by an idealized amount of production per man, which resulted in the correct number of men per department; he then laid off any employees beyond this number, apparently on the theory that the production of the remaining men would increase to meet the quota.

[79] The layoff of "Page" department employee John MacFarland was not alleged in the complaint nor argued by the General Counsel on brief. Accordingly, I will not address MacFarland's layoff in this decision.

[80] Collins so testified.

[81] Smith Jr. confirmed on cross-examination that, if an employee had been an understructure welder for 10 years and had become a small parts welder 2 months before the layoff, he would consider the employee to have 2 months' seniority.

[82] Three department employees had less company seniority than either Chandler, Howard, or Newberry, and six employees in the aluminum department (excluding Chandler and Newberry) had less seniority than Howard.

[83] Smith Jr. testified that production fell from 10 beds to between 3 and 5 beds per week; average production for the 4.5 weeks of July was 3.88 beds per week, while the average for the same duration of August was 3.22 beds per week.

receipt of aluminum orders in the second and third quarters of 1995 caused a reduction by 2 of 22 aluminum department employees (1 of the departing employees was temporarily laid off), as opposed to a permanent layoff of 11 of 21 employees during the same part of 1996, (4) Respondent's budget documents show that the installation department, which never suffered a layoff, was the least efficient department in Respondent's operation (i.e., it was over-budget in payroll expenses for each of the first 10 months of 1996), and (5) although the level of orders in the aluminum department fell again after August, department employees began working overtime 2 weeks after the reduction,[84] 5 employees were transferred into the department by the third week of October and three more employees were transferred in by the first week of the following January. Based on these facts and for the reasons discussed in connection with the July 12 and August 1 layoffs, I find the August 29 and 30 reduction in force to be without any honest business justification and to have been discriminatorily motivated. I therefore conclude that the reduction violated Section 8(a)(3) of the Act.

On September 6, Respondent wrote to the employees who had been laid off on July 12 and August 1, informing them that their temporary layoffs had been made permanent. Collins explained that, when it became necessary to terminate the more experienced employees at the end of August, it made no sense to leave less qualified employees on layoff status. Interestingly, (1) all of the employees laid off before August 29 were senior to three of those who left on August 29 and 30 and (2) three of the eight former employees to whom Respondent offered employment in February 1997 were among those "less qualified." Equally interesting is the fact that the decision to make the layoffs permanent (and the permanently laid-off employees ineligible to vote in the representation election one month later) coincided temporally with Respondent's employment of Craft as a labor consultant. For the reasons set out above, I conclude that Respondent's conversion of the July 12 and August 1 layoffs from temporary to permanent was discriminatorily motivated and violation of Section 8(a)(3) of the Act.

III. THE REPRESENTATION CASE

A. Ballot Challenges

At the October 11 election in Case 9–RC–16781, a Board Agent challenged the ballots of Greg Adkins, Ernie Blevins, Nero Blevins, Ronnie Castle, Terry Chaffins, William Chandler, Thomas Floyd, Jeff Howard, DeWayne Kendrick, Ray Knott, Eric Newberry, Greg Tackett, Randy Wiley, and Mike Williamson on the ground that their names did not appear on the eligibility list. Given my findings above that each of these individuals was unlawfully terminated by Respondent, the challenges will be overruled and the ballots opened and counted.

At the same time, the Union challenged the ballots of Michael Auxier, Ervin Collins, and Willis Matthews on alternative grounds that (1) they were independent contractors, (2) they were casual employees, or (3) they did not share a community of interest with unit employees. Auxier and Collins were regarded by Respondent as full-time pickup and delivery truck drivers, while Willis was regarded as a regular part-time employee in that position.[85] These drivers are only paid when Respondent requires the pickup or delivery of products, but the time they actually work is in excess of that required of part-time employees.[86] These three drivers have the same method of compensation, receive the same basic benefits and enjoy the same profit-sharing participation,[87] must meet the same job requirements (physical, educational, and licensing)[88] and perform the same day-to-day functions under the same working conditions and within the same regulatory framework[89] as Respondent's single tractor/trailer truck driver, an individual whose ballot was not challenged by the Union. Respondent's pickup and delivery drivers report to a different supervisor than does its tractor/trailer truck driver. On occasions when none of Respondent's pickup and delivery drivers is available, their duties are performed by production employees from the unit.[90] Finally, a grammatical cavil may shed light on the parties' intent: the stipulated unit refers to "drivers" in the plural; without Auxier, Collins, and Matthews, the unit would include only one driver. Based on the foregoing facts, I find that the challenges to the ballots of the pickup and delivery drivers should be overruled and that their ballots should be opened and counted.

The Union also challenged the ballots of Ruby and Wade Conn on the grounds that (1) they were not statutory employees and (2) they did not share a community of interest with unit employees. Prior to 1989, Ruby Conn was employed by William and Delores Smith Sr. as a domestic servant at their home; the employment relationship during that period between the Smiths Sr. and Wade Conn, Ruby's husband, is not of record. On June 12, 1989, the Conns were placed on Respondent's payroll as janitors at the instance of Delores Smith, who at that time was a vice president of Respondent with no other personnel responsibilities.[91] Thereafter, the Conns spent the preponderance of their working hours (over 80 percent during 1996) as household domestics at the Smith Sr.'s home, while performing occasional office janitorial duties at Respondent's facility. Neither individual spent a demonstrated minimum or regular number of hours per month working at the facility during 1996. Indeed, Wade did not perform any work at the facility during

[84] Respondent's argument that this overtime may have been worked by aluminum department employees outside that department was left as an unsubstantiated speculation.

[85] This finding is based on Respondent's personnel records, which are supported by Charles Collins' testimony.

[86] During the third quarter of 1996, (1) Auxier, who was not employed for a 2-week period, worked on an average of 10 days per month, generally in excess of 8 hours per day, (2) Collins, who took his scheduled vacation during this period, worked an average of 9 days per month, generally in excess of 8 hours per day, and (3) Matthews worked an average of 12 days per month, generally in excess of 8 hours per day.

[87] Charles Collins so testified without controversion.

[88] This finding is based on the relevant position descriptions.

[89] Charles Collins' uncontroverted testimony to this effect was supported by the relevant position descriptions.

[90] Charles Collins testified without controversion as to the identity of at least one production employee who had performed the duties of a pickup and delivery driver.

[91] Charles Collins testified to this effect.

four months of the year and Ruby spent less than 2 days at the facility during 2 separate months.[92] At the Smith Sr. home, the Conns are supervised by the Smiths Sr. There is no evidence that the Conns' occasional work at the facility is supervised by any of the managers or supervisors who supervise Respondent's production and maintenance employees. Wade's annual performance review is filled out by his wife and reviewed by Charles Collins, while Ruby is reviewed directly by Collins; Respondent's general manager does not otherwise review the performance of any nonmanagerial employees.[93] Based on these facts, I find that the Union's challenges to the ballots of Ruby and Wade Conn should be sustained.

B. Respondent's Objection

Respondent alleges that, on the evening of October 10, the Union knowingly and intentionally made false representations to a substantial number of unit employees concerning the Union's collective-bargaining agreement with Cook Family Foods. Based on the findings set our earlier in this decision, I further find Respondent's objection to be without factual support.[94] Accordingly, it is overruled.

C. The Union's Objections

The following union objections to the election are before me for consideration: objection 1, relating to threats of plant closure or relocation; objection 2, relating to the discharge of Mitchell Goble; objection 3, relating to "other accusations which would discourage employees from voting for union representation"; objection 4, relating to the layoff or discharge of Greg Adkins, Ernie Blevins, Nero Blevins, Ronnie Castle, William Chandler, Jeff Howard, DeWayne Kendrick, Ray Knott, Eric Newberry, Adam Swiney, Greg Tackett, Randy Wiley, and Mike Williamson; objection 5, relating to a change in Respondent's pay procedures; and "Other Conduct," relating to the conversion of the July 12 and August 1 layoffs from temporary to permanent. Objections 1, 2, 4, and "Other Conduct," which are coextensive with allegations of the complaint found above to constitute unfair labor practices, are sustained. See *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786 (1962). Objections 3 and 5 are not duplicative of allegations of the complaint, appear to have been abandoned on brief and are overruled. For the foregoing reasons, I shall order that, should my rulings on challenged ballots result in a vote tally in favor of Respondent, the election be set aside.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act: (a) interrogating employees concerning their union activities or the union activities of other employees, (b) threatening employees with job loss, layoff, denial of recall, suspension, reduced profit-sharing bonuses, contacting former employers, plant closure or relocation, or other unspecified reprisals, if they select a union to represent them, (c) impliedly threatening employees or promising them benefits by soliciting them to campaign against the union or to disclose the prounion activities of other employees, (d) promising or impliedly promising employees improved working conditions or other benefits, if employees reject union representation, and (e) giving employees the impression that their union activities or the union activities of other employees are being kept under surveillance.

4. By the following acts, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act: warning employees, reducing employees' pay, suspending employees, temporarily laying off employees, permanently laying off employees, converting employees' temporary layoffs to permanent layoffs, discharging employees, refusing to rehire employees and conditioning employees' return to work on their relinquishment of seniority and related benefits, because employees join or assist the union or engage in concerted activities.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The preponderance of the evidence does not indicate that Respondent has otherwise violated the Act.

7. Respondent unlawfully interfered with the representation election held on October 11, 1996.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease those practices and to take certain affirmative action designed to effectuate the policies of the Act. Respondent will be ordered to make whole any employees in the unit who sustained losses in wages or benefits because of Respondents' unlawful conduct. Such amounts shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[95]

ORDER

The Respondent, R & S Truck Body Company, Inc., Allen, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities or the union activities of other employees.

(b) Threatening employees with job loss, layoff, denial of recall, suspension, reduced profit-sharing bonuses, contacting former employers, plant closure or relocation, or other unspecified reprisals, if they select a union to represent them.

[92] Findings on the Conns' work patterns are derived from documentary evidence concerning the number of hours they worked.

[93] Charles Collins testified to this effect.

[94] In addition, the preponderance of credible evidence does not substantiate Respondent's contention that the Union used a forged document on October 10.

[95] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Impliedly threatening employees or promising them benefits by soliciting them to campaign against the union or to disclose the prounion activities of other employees.

(d) Promising or impliedly promising employees improved working conditions or other benefits, if employees reject union representation.

(e) Giving employees the impression that their union activities or the union activities of other employees are being kept under surveillance.

(f) Warning employees, reducing employees' pay, suspending employees, temporarily laying off employees, permanently laying off employees, converting employees' temporary layoffs to permanent layoffs, discharging employees, refusing to rehire employees and conditioning employees' return to work on their relinquishment of seniority and related benefits, because employees join or assist the Union or engage in concerted activities.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Greg Adkins, Ernie Blevins, Nero Blevins, Ronnie Castle, Terry Chaffins, William Chandler, Thomas Floyd, Mark Fraley, Mitchell Goble, Craig Hall, Jeff Howard, DeWayne Kendrick, Ray Knott, Eric Newberry, Mark Salyer, Adam Swiney, Greg Tackett, Randy Wiley, Mike Williamson, and Grady Yates immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, offer Rodney Goble Jr. immediate and full reinstatement to the day-shift parts window clerk position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and/or discharges of Nero Blevins, Mitchell Goble, DeWayne Kendrick, and Randy Wiley and notify them in writing that this has been done and that the suspensions and/or discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Greg Adkins, Ernie Blevins, Ronnie Castle, Terry Chaffins, William Chandler, Thomas Floyd, Mark Fraley, Craig Hall, Jeff Howard, Ray Knott, Eric Newberry, Mark Salyer, Adam Swiney, Greg Tackett, Mike Williamson, and Grady Yates, and notify them in writing that this has been done and that the layoffs will not be used against them in any way.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning of Bobby Rowe, and notify him in writing that this has been done and that the warning will not be used against him in any way.

(f) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(g) Within 14 days after service by the Region, post at its Allen, Kentucky facility copies of the attached notice marked "Appendix."[96] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 4, 1996.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER RECOMMENDED that:

1. Respondent's objection to the election of October 11, 1996, be overruled.

2. Objections 1, 2, 4, and "Other Conduct" filed by the National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO (the Union) be sustained, and the Union's objections 3 and 5 be overruled.

3. Within 14 days from the date of this decision, the challenged ballots of Greg Adkins, Michael Auxier, Ernie Blevins, Nero Blevins, Ronnie Castle, Terry Chaffins, William Chandler, Ervin Collins, Thomas Floyd, Jeff Howard, DeWayne Kendrick, Willis Matthews, Ray Knott, Eric Newberry, Greg Tackett, Randy Wiley, and Mike Williamson in Case 9–RC–16781 be opened and counted by the Regional Director and a revised tally of ballots be issued.

4. If the revised tally of ballots reveals that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the

[96] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

revised tally shows that the Union has not received a majority of the ballots cast, the Regional Director shall set aside the election and conduct a new election when he deems that circumstances permit the free choice of a bargaining representative.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL interrogate you concerning your union activities or the union activities of other employees.

WE WILL NOT threaten you with job loss, layoff, denial of recall, suspension, reduced profit-sharing bonuses, contacting former employers, plant closure or relocation, or other unspecified reprisals, if you select the National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO, or any other union to represent you.

WE WILL NOT impliedly threaten you or promise you benefits by soliciting you to campaign against the National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO**,** or any other union or solicit you to disclose the pro-union activities of other employees.

WE WILL NOT promise or impliedly promise you improved working conditions or other benefits, if you reject union representation by the National Conference of Firemen and Oilers**,** Service Employees International Union, AFL–CIO, or any other union.

WE WILL NOT give you the impression that your union activities or the union activities of other employees are being kept under surveillance.

WE WILL NOT warn you, reduce your pay, suspend you, temporarily lay you off, permanently lay you off, convert your temporary layoff to a permanent layoff, discharge you, refuse to rehire you or condition your return to work on your relinquishment of seniority and related benefits, because you join or assist the National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO, or any other union or because you engage in concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Greg Adkins, Ernie Blevins, Nero Blevins, Ronnie Castle, Terry Chaffins, William Chandler, Thomas Floyd, Mark Fraley, Mitchell Goble, Craig Hall, Jeff Howard, DeWayne Kendrick, Ray Knott, Eric Newberry, Mark Salyer, Adam Swiney, Greg Tackett, Randy Wiley, Mike Williamson, and Grady Yates immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings or other benefits suffered as a result of our discrimination against them.

WE WILL offer Rodney Goble Jr. immediate and full reinstatement to the day shift parts window clerk position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings or other benefits suffered as a result of our discrimination against him.

WE WILL remove from our files any reference to the unlawful suspensions and/or discharges of Nero Blevins, Mitchell Goble, DeWayne Kendrick, and Randy Wiley, and WE WILL notify them in writing that this has been done and that the suspensions and/or discharges will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful layoffs of Greg Adkins, Ernie Blevins, Ronnie Castle, Terry Chaffins, William Chandler, Thomas Floyd, Mark Fraley, Craig Hall, Jeff Howard, Ray Knott, Eric Newberry, Mark Salyer, Adam Swiney, Greg Tackett, Mike Williamson, and Grady Yates, and WE WILL notify them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL remove from our files any reference to the unlawful warning of Bobby Rowe, and WE WILL notify him in writing that this has been done and that the warning will not be used against him in any way.

R&S TRUCK BODY COMPANY, INC.